No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF ARIZONA

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QUESTION PRESENTED

The hypothetical question propounded by the Government's counsel to their expert witness, Doctor Townsend, (Abs. Rec. page 22 et seq.) calls for an opinion of said expert upon the ultimate issue to be determined by the jury, towit: the good faith of the defendant and if such prescription was issued in the professional practice only of such defendant and constitutes reversible error.

ARGUMENT

In a case charging a physician with a violation of Section 696 of Title 26 United States Code, the ultimate issue for the jury to determine is whether the prescription issued and dispensed by said physician was issued to a patient in the course of his professional practice only.

This ultimate issue, like the ultimate issue in every case, must be decided by the jury upon all the evidence in obedience to the Judge's instructions as to the legal meaning of all crucial phrases, other questions of law, such as the credibility of witnesses, burden of proof, reasonable doubt, weight of the testimony, etc.

To permit any witness, expert or non-expert, to give his opinion on the ultimate issue to be decided by the jury, is an invasion of the province of the jury and a deprivation to the defendant of his right to have the jury determine this ultimate fact from evidentiary matter and not from opinions of experts.

That this in the rule of law in this jurisdiction is too clear for argument. This Honorable Court in the case of U. S. vs. Stephens, 73 Federal Second 695, reversed a judgment of a District Court because a hypothetical question propounded to a medical witness asked for his opinion as to the ultimate fact in the case and therefore invaded the province of the jury.

Other Circuit Courts of Appeal have followed this rule of law.

U. S. vs. Bass (C. C. A. 7) 64 Federal (2) 467.

U. S. vs. Sauls (C. C. A. 4) 65 Federal (2) 886.

Hamilton vs. U. S. (C. C. A. 5) 73 Federal (2) 357.

U. S. vs. Steadman (C. C. A. 10) 73 Federal (2) 706.

On January 7, 1935, the Supreme Court of the United States in the case entitled U. S. vs. Spaulding, Volume 79

Law Edition page 251, (Advance Opinions) reversed a judgment of the Fifth Circuit Court of Appeals sustaining a judgment of the District Court of the United States for the Northern District of Florida on the ground that expert medical witnesses had been asked and permitted to state their conclusions on the whole case. That Honorable Court said:

> "It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case."

Defense counsel admit that the above cases were civil suits on War Risk Insurance policies. The rule of law should be and is the same in civil suits of every nature. The rules governing the admissability of opinion and expert testimony are the same in Criminal Cases as in Civil Cases.

16 C. J. 747, Section 1532.

Jones on Evidence, Section 1321.

Underhill's Criminal Evidence, Section 185-187.

The desireability of keeping expert testimony within proper bounds is especially manifest in criminal cases where the life or liberty of the accused is at stake.

16 C. J. 747, Section 1532.

People vs. Vanderhoof, 71 Mich. 158, 39 NW 28.

It is also recognized that expert opinion predicated on hypothetical questions is particularly objectionable. This is so because hypothetical questions can be framed, and usually are framed, in a manner that the answer of the expert can only be the answer desired by the proponent of the question. Most hypothetical questions fail to contain all of the facts and fail to recognize the true rules of law

involved in the case. This is illustrated by the hypothetical question involved in the instant case. It fails to contain any reference to the rule of law contained in the Linder case, which recognizes that there are ills incident to addiction and that addiction itself is a disease. It is predicated solely on Art. 85 Exceptions 1 and 2.

Defense counsel admit that the jury was entitled to expert testimony with respect to recognized medical standards and methods of treating patients such as Pat Rooney. Such testimony would be an evidentiary fact, which, with all the evidence of the case, considered in obedience to the Judge's instructions as to the law, would enable it to decide the ultimate issue. However, the answer to this hypothetical question is only that particular physician's idea of the proper treatment of addicts and does not purport, unless it is considered to do so by inference, to inform the jury as to the recognized medical standards and methods of treating patients such as Pat Rooney.

The issues in the instant case "can be fully tried by presenting all the facts to the jury, and by confining the physicians to simple opinions on matters strictly within their province, not extending them to the complex conclusion to be reached by the jury."

Hamilton vs. U. S. (C. C. A. 5) 73 Federal (2) 357-359.

The hypothetical question in calling for a conclusion from the expert on the ultimate fact to be found by the jury clearly usurped the duty of the jury, was an invasion of its sole province and is reversible error.

Respectfully submitted,

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TABLE OF CASES

TEXT BOOKS CITED